

rule change so that it has sufficient time to consider the proposed rule change. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,⁵ designates July 9, 2024, as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change (File No. SR-NYSE-2024-18).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁶

J. Matthew DeLesDernier,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-100208; File No. SR-NASDAQ-2024-019]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change to Rules 5605, 5615 and 5810 To Clarify and Modify Phase-In Schedules for Certain Corporate Governance Requirements and Clarify Applicability of Certain Cure Periods

May 22, 2024

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on May 8, 2024, The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to change Rules 5605, 5615 and 5810 to clarify and modify phase-in schedules for certain corporate governance requirements and clarify applicability of certain cure periods.

The text of the proposed rule change is available on the Exchange’s website at <https://listingcenter.nasdaq.com/rulebook/nasdaq/rules>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

⁵ 15 U.S.C. 78s(b)(2).

⁶ 17 CFR 200.30-3(a)(31).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Nasdaq is proposing to clarify and modify the phase-in schedules to the independent director and committee requirement for certain companies. Nasdaq is also proposing to clarify the applicability of certain cure periods.

Initial Public Offerings

Nasdaq is proposing to clarify and modify the phase-in schedules to the independent director and committee requirements for IPOs. Specifically, Rule 5615(b)(1) currently references that a company listing in connection with an IPO is permitted to phase in its independent audit committee requirements in accordance with SEC Rule 10A-3(b)(1)(iv)(A) under the Act but does not restate the provisions of this rule. Nasdaq proposes to amend Rule 5615(b)(1) by specifically restating the phase-in provisions in the text of the rule and state that a company shall be permitted to phase in its compliance with the audit committee requirements set forth in Rule 5605(c)(2) as follows: (1) one member must satisfy the requirements by the date the company’s securities first trade on Nasdaq (the “Listing Date”); (2) a majority of members must satisfy the requirements within 90 days of the effective date of its registration statement; and (3) all members must satisfy the requirements within one year of the effective date of its registration statement.³

Rule 5605(c)(2)(A) requires a company to have a minimum of three members on the audit committee. As a result, companies listed in connection with an IPO which are not required to have a fully independent audit committee until one year from the Listing Date may appoint non-

independent directors to the audit committee in order to satisfy the three-person minimum requirement. Nasdaq proposes to amend Rule 5615(b)(1) to provide that companies listing in conjunction with an IPO may also phase in compliance with the three-person minimum on the following schedule: at least one member by the Listing Date, at least two members within 90 days of the Listing Date and at least three members within one year of the Listing Date. This proposal is consistent with the approach of the NYSE.⁴ Nasdaq notes that in the NYSE Approval Order the Commission indicated that “permitting a company to have only one member on its audit committee by the listing date, at least two members within ninety days of the listing date, and three members within a year of the listing date, affords a reasonable accommodation for [affected] companies.”⁵

Rule 5615(b)(1) currently allows companies listing in connection with an IPO to phase in the requirements for their independent nominations and compensation committees but requires one member to satisfy the requirements at the time of listing. Some companies expressed a concern that this requirement interferes with a common practice to hold a meeting of a board of directors in order to appoint additional independent directors shortly after the Listing Date, but prior to the date IPO closes.⁶ To accommodate this practice, Nasdaq proposes to amend Rule 5615(b)(1) to allow the companies to comply with the requirement to have one independent director on the compensation and nominations committees by appointing an independent director to such a committee no later than the earlier of the date of the initial public offering closes or five business days from the Listing Date. This proposal is consistent with the approach of the NYSE.⁷

⁴ See Section 303A.00 Introduction; of the NYSE Listed Company Manual. See also Securities Exchange Act Release No. 61067 (November 25, 2009), 74 FR 63808 (December 4, 2009) (approving SR-NYSE-2009-89) (the “NYSE Approval Order”).

⁵ The NYSE Approval Order at 63811.

⁶ See e.g. NYSE IPO Guide, page 41 at https://www.nyse.com/publicdocs/nyse/listing/nyse_ipo_guide.pdf#process-timeline (“After building a book of demand, the lead bookrunners will agree on the offering price with the company and shareholders, execute the underwriting agreement and allocate the IPO to investors. The following day, the company begins publicly trading on the NYSE or another exchange, rings the opening bell and hosts other key marketing events associated with being a public company. Two business days later, the IPO closes, at which point stock is delivered to investors against payment of the offering price, and various legal opinions are delivered by counsel.”)

⁷ See Section 303A.00 Introduction; of the NYSE Listed Company Manual. See also Securities Exchange Act Release No. 61067 (November 25,

³ See 17 CFR 240.10A-3(b)(1)(iv)(A).

Nasdaq is also proposing to correct a misleading rule reference in Rule 5615(b)(1), which allows a Company not to adopt a nominations committee but instead rely upon a majority of the Independent Directors to discharge responsibilities under Rule 5605(b). The responsibilities of the nominations committee are found in Rule 5605(e), not Rule 5605(b). Accordingly, new Rule 5615(b)(1)(C) allows a majority of the Independent Directors to discharge responsibilities of the nominations committee under Rule 5605(e).

Nasdaq is also proposing to eliminate the reference to Rule 5625 in Rule 5615(b)(1) which states that: “For purposes of . . . Rule 5625, a Company shall be considered to be listing in conjunction with an initial public offering only if it meets the conditions in Rule 10A–3(b)(1)(iv)(A) under the Act, namely, that the Company was not, immediately prior to the effective date of a registration statement, required to file reports with the Commission pursuant to Section 13(a) or 15(d) of the Act.” By its terms, Rule 5625 (Notification of Noncompliance) applies to any company listed on Nasdaq, including in conjunction with an IPO, and requires that a “Company must provide Nasdaq with prompt notification after an Executive Officer of the Company becomes aware of any noncompliance by the Company with the requirements of this Rule 5600 Series.” This notification of noncompliance requirement of Rule 5625 is not affected or modified in any way by the aforementioned reference in Rule 5615(b) because Rule 5625 applies to a Nasdaq-listed company regardless of whether it was listed “in conjunction with an initial public offering” or not. Moreover, Rule 5615(b)(1) does not provide an exemption from Rule 5625 for any company. Accordingly, Nasdaq proposes to eliminate the references to Rule 5625 in Rule 5615(b)(1) to simplify the rules to eliminate potential confusion without any substantive impact.

Companies Emerging From Bankruptcy

Rule 5615(b)(2) allows a company that is emerging from bankruptcy to phase in independent nominations and compensation committees and majority independent boards requirements. Nasdaq proposes to amend Rule 5615(b)(2) to codify its current position that a company emerging from bankruptcy must comply with the audit committee composition requirements

set forth in Rule 5605(c)(2)⁸ by the Listing Date unless an exemption is available pursuant to Rule 10A–3. Nasdaq also proposes to make additional clarifications to improve the readability of the rule without changing its substance, including to provide that the applicable phase-in periods will be computed beginning on the Listing Date.

Companies Transferring From National Securities Exchanges

Rule 5615(b)(3) provides that companies transferring from other markets with a substantially similar requirement shall be afforded the balance of any grace period afforded by the other market. Rule 5615(b)(3) further provides that companies transferring from other listed markets that do not have a substantially similar requirement shall be afforded one year from the date of listing on Nasdaq.

Nasdaq proposes to clarify that the phase-in period currently contained in Rule 5615(b)(3) is applicable only to companies that transfer securities registered pursuant to Section 12(b) of the Act⁹ from another national securities exchange to Nasdaq and to specify requirements applicable to a company listing securities registered pursuant to Section 12(g) of the Act,¹⁰ as described below.

Companies Listing Securities Previously Registered Under Section 12(g)

Nasdaq proposes to modify Rule 5615(b)(3) to provide that a company with securities registered pursuant to Section 12(g) of the Act¹¹ that lists those securities on Nasdaq must satisfy the audit committee requirements set forth in the Rule 5605(c) except for the requirement to have at least three members on the audit committee, as described below, by the Listing Date, unless an exemption is available pursuant to Rule 10A–3 under the Act.

Nasdaq proposes to modify Rule 5615(b)(3) to also provide that a company with securities registered pursuant to Section 12(g) of the Act that lists those securities on Nasdaq will be provided a similar phase-in period as available to companies listing in connection with an IPO, other than the audit committee requirements. Like a company conducting an IPO, these companies would not have been subject to another exchange’s corporate

⁸ Rule 5605(c)(2) requires a company to have, an audit committee of at least three members, which must meet certain independence, professional competence and other requirements as specified in the rule.

⁹ 15 U.S.C. 78l(b).

¹⁰ 15 U.S.C. 78l(g).

¹¹ 15 U.S.C. 78l(g).

governance standards at the time of their listing. Therefore, Nasdaq proposes to allow these companies a similar phase-in period as currently provided to an IPO, other than the audit committee requirements, and require, on the nominations and compensation committee, one independent director upon listing, a majority of independent directors within 90 days of Listing Date, and a fully independent committee within one year of Listing Date.¹² The company also would have twelve months from its Listing Date to comply with the majority independent board requirement set forth in Rule 5605(b).

Under the revised rule, for a company with securities registered pursuant to Section 12(g) of the Act that lists those securities on Nasdaq, only directors who are independent, as defined in Rule 5605(a)(2), and meet the criteria for independence set forth in Rule 10A–3(b)(1) under the Act would be permitted on the audit committee during the transition period (unless an exemption is available under Rule 10A–3 under the Act).¹³ However, a phase-in period would be permitted with respect to the committee size requirement: at least one independent director member is required as of the date of listing, two independent director members within ninety days of the Listing Date, and three independent director members within one year of the Listing Date.¹⁴ These changes adopt the same phase-in schedule for these companies as is in place for a similar company listing on the New York Stock Exchange (“NYSE”).¹⁵ The revised rule would also specify that a company’s compensation committee must have at least one member at the time of listing

¹² The independent directors serving on the compensation committee would also be required to satisfy the requirements of Rule 10C–1 under the Act.

¹³ Each member of the audit committee must also: (1) not have participated in the preparation of the financial statements of the company or any current subsidiary of the company at any time during the past three years; and (2) be able to read and understand fundamental financial statements, including a company’s balance sheet, income statement, and cash flow statement. *See* Rule 5605(c)(2)(A).

¹⁴ During the phase-in period a company must comply with the requirement in Rule 5605(c)(2)(A) that every listed company’s audit committee—without distinction as to the committee’s size—have at least one member who has past employment experience in finance or accounting, requisite professional certification in accounting, or any other comparable experience or background which results in the individual’s financial sophistication.

¹⁵ *See* Section 303A.00 of the NYSE Listed Company Manual. *See also* Securities Exchange Act Release No. 61067 (November 25, 2009), 74 FR 63808 (December 4, 2009) (approving SR–NYSE–2009–89).

and at least two members within one year of listing.¹⁶

Companies Listing in Connection With a Carve-Out or Spin-Off Transaction

Nasdaq proposes to provide that a company listing in connection with a carve-out or spin-off transaction will have a similar phase-in period as currently available to companies listing in connection with an IPO. Like a company conducting an IPO, these companies would not have been subject to another exchange's corporate governance standards at the time of their listing. Therefore, Nasdaq proposes to adopt Rule 5615(b)(4)¹⁷ specifying the phase-in provisions and stating that a company shall be permitted to phase in its compliance with the audit committee requirements set forth in Rule 5605(c)(2) as follows: (1) one member must satisfy the requirements by the Listing Date; (2) a majority of members must satisfy the requirements within 90 days of the effective date of its registration statement; and (3) all members must satisfy the requirements within one year of the effective date of its registration statement.

Nasdaq also proposes to allow these companies a similar phase-in period as an IPO and require that a company listing in connection with a carve-out or spin-off transaction shall have twelve months from its Listing Date to comply with the majority independent board requirement set forth in Rule 5605(b), and, on the nominations and compensation committee, one independent director by the date the transaction closes, a majority of independent directors within 90 days of the Listing Date, and a fully independent committee within one year of the Listing Date.¹⁸ Nasdaq also proposes to provide that, regarding the requirement to have at least two members on the compensation committee, a company's compensation committee must have at least one member by the date the transaction closes and at least two members within one year of the Listing Date.¹⁹

¹⁶ See Securities Exchange Act Release No. 68013 (October 9, 2012), 77 FR 62563 (October 15, 2012) (Notice of Filing for SR-NASDAQ-2012-109) at footnote 67. See also Securities Exchange Act Release No. 34-68640 (January 11, 2013), 78 FR 4554 (January 22, 2013) (approving SR-NASDAQ-2012-109).

¹⁷ Nasdaq proposes to renumber current Rule 5615(b)(4) regarding phase-in schedule for a company ceasing to be a Smaller Reporting Company to Rule 5615(b)(5).

¹⁸ The independent directors serving on the compensation committee would also be required to satisfy the requirements of SEC Rule 10C-1 under the Act.

¹⁹ See Securities Exchange Act Release No. 68013 (October 9, 2012), 77 FR 62563 (October 15, 2012)

Nasdaq's current policy is to treat companies listing in connection with a carve-out or spin-off transaction as IPOs for purposes of phase-in periods. Thus, Nasdaq allows such companies to phase in the requirements for their independent nominations and compensation committees but require one member to satisfy the requirements at the time of listing. Some companies expressed a concern that this requirement interferes with a common practice to hold a meeting of a board of directors in order to appoint additional independent directors shortly after the Listing Date, but prior to the date a carve-out or spin-off transaction closes. To accommodate this practice, Nasdaq proposes to allow the companies to comply with the requirement to have one independent director on the compensation and nominations committees by appointing an independent director to such a committee no later than the date such carve-out or spin-off transaction closes. This proposal is consistent with the approach of the NYSE.²⁰

Rule 5605(c)(2)(A) requires a company to have a minimum of three members on the audit committee. As a result, companies listed in connection with a carve-out or spin-off transaction which are not required to have a fully independent audit committee until one year from the Listing Date may appoint non-independent directors to the audit committee in order to satisfy the three-person minimum requirement. Nasdaq proposes to provide that companies listing in connection with a carve-out or spin-off transaction may also phase in compliance with the three-person minimum on the following schedule: at least one member by the Listing Date, at least two members within 90 days of the Listing Date and at least three members within one year of the Listing Date.²¹ This proposal is consistent with the approach of the NYSE.²²

Companies Ceasing To Be a Smaller Reporting Company

Nasdaq proposes to amend the title of Rule 5615(b)(4), renumber it to Rule

(Notice of Filing for SR-NASDAQ-2012-109) at footnote 67. See also Securities Exchange Act Release No. 34-68640 (January 11, 2013), 78 FR 4554 (January 22, 2013) (approving SR-NASDAQ-2012-109).

²⁰ See Section 303A.00 Introduction; of the NYSE Listed Company Manual. See also Securities Exchange Act Release No. 61067 (November 25, 2009), 74 FR 63808 (December 4, 2009) (approving SR-NYSE-2009-89).

²¹ See footnote 15 above.

²² See Section 303A.00 Introduction; of the NYSE Listed Company Manual. See also Securities Exchange Act Release No. 61067 (November 25, 2009), 74 FR 63808 (December 4, 2009) (approving SR-NYSE-2009-89).

5615(b)(5) and add an introductory sentence to improve the readability of the rule without changing its substance.

Companies Ceasing To Qualify as a Foreign Private Issuer

Pursuant to Rule 5615(a)(3), a Foreign Private Issuer, as defined under SEC Rule 3b-4 under the Exchange Act of 1934 (the "Act"), may follow its home country practice in lieu of the requirements of the Rule 5600 Series, provided, however, that such a Company is required to comply with the Notification of Noncompliance requirement (Rule 5625), the Voting Rights requirement (Rule 5640), the Diverse Board Representation Rule (Rule 5605(f)), the Board Diversity Disclosure Rule (Rule 5606), have an audit committee that satisfies Rule 5605(c)(3), and ensure that such audit committee's members meet the independence requirement in Rule 5605(c)(2)(A)(ii).

A Foreign Private Issuer that ceases to qualify as such under SEC rules becomes subject to all relevant corporate governance requirements of Rule 5605. Depending on the type of issuer, these may include the requirement to have independent nominations and compensation committees and a majority of independent directors. In addition, the company's directors may be required to meet the definition of independence under Rule 5605(a). Pursuant to Rule 3b-4 under the Act, a company must test its status as a Foreign Private Issuer on an annual basis at the end of its most recently completed second fiscal quarter (for purposes of this subsection, the "Foreign Private Issuer Determination Date"). Nasdaq proposes to modify its rules to take into consideration Rule 3b-4 under the Act. Under this rule, a company's determination that it fails to qualify as a Foreign Private Issuer governs its eligibility to use the forms and rules designated for Foreign Private Issuers beginning on the first day of the fiscal year following the determination date, effectively providing the company with a six-month grace period. Similarly, Nasdaq proposes to require a company that ceases to be a Foreign Private Issuer to be in compliance with the domestic company requirements within the same timeframe of six months, except for the requirement set forth in Rule 5605(c)(2)(A)(ii).

Specifically, the company shall have six months from the Foreign Private Issuer Determination Date to comply with the majority independent board requirement set forth in Rule 5605(b); the independent compensation and nominations committee requirements

set forth in Rules 5605(d)(2) and (e)(1)(B); and audit committee requirements set forth in Rule 5605(c)(2), including the three-person audit committee requirement. During the phase-in period, a company shall have an audit committee that satisfies Rule 5605(c)(3) and members of such audit committee shall meet the criteria for independence referenced in Rule 5605(c)(2)(A)(ii) (the criteria set forth in Rule 10A-3(b)(1) under the Act, subject to the exemptions provided in Rule 10A-3(c) under the Act). This proposal is consistent with the approach of the NYSE.²³

Preamble to Phase-In Rules

Nasdaq proposes to add an introductory paragraph to Rule 5615(b) to improve the readability of the rules without changing its substance. Nasdaq also proposes to codify its current policy that a company that demonstrates compliance with a requirement during a phase-in period but subsequently falls out of compliance with that requirement before the end of the phase-in period, would not be considered deficient with the requirement until the end of the phase-in period. This treatment is consistent with treatment of a company that relied on a phase-in period throughout its duration.

Unavailability of Grace Periods Following the Expiration of Phase-In Periods

Nasdaq proposes to amend Rules 5605(b)(1), 5605(c)(4), 5605(d)(4), and 5810(c)(3)(E) to codify its current position that a company relying on any phase-in period in Rule 5615(b) is not eligible for a cure period provided by Rule 5810(c)(3)(E), immediately following the expiration of the phase-in period, unless the company complied with the audit committee composition requirement in Rule 5605(c)(2)(A), the compensation committee composition requirement in Rule 5605(d)(2)(A), or the majority independent board requirement in Rule 5605(b)(1), as applicable, during such phase-in period but fell out of compliance with such requirement after having complied with the requirement before the end of the phase-in period. Nasdaq also proposes to codify its current policy that, if a company demonstrated compliance with the applicable requirement during the phase-in period, but subsequently fell out of compliance before the end of the phase-in period, for purposes of

computing the applicable cure period, the event that caused the failure to comply is the event causing the company to fall out of compliance after having complied with the requirement, and not the end of the phase-in period. In these circumstances, as described above, the company would not be considered deficient with the requirement until the end of the phase-in period.

In a situation where a company lists on Nasdaq or becomes subject to the requirements after it lists, relies on the phase-in period for one of the independent committees or the independent board requirements, and allows the phase-in period to run out without demonstrating compliance with the rule, Nasdaq believes it is not appropriate for the company to rely on the grace period immediately thereafter thus effectively extending the phase-in period. In such a case, Nasdaq will issue a Staff Delisting Determination letter to delist the Company's securities.

Nasdaq also proposes to amend Rule 5810(c)(3)(E) to describe procedures for administering a cure period in the event a company fails to comply with the compensation committee composition requirement under Rule 5605(d)(2)(A) due to one vacancy. Specifically, as amended, Rule 5810(c)(3)(E) will provide that if a company fails to meet the compensation committee composition requirement under Rule 5605(d)(2)(A) due to one vacancy, or one compensation committee member ceases to be independent due to circumstances beyond the member's reasonable control, the Listing Qualifications Department will promptly notify the company and inform it has until the earlier of its next annual shareholders meeting or one year from the occurrence of the event that caused the failure to comply with this requirement to cure the deficiency. However, if the company's next annual shareholders' meeting is held sooner than 180 days after the event that caused the deficiency, then the company has 180 days from the event that caused the deficiency to cure it.

Renumbering of Certain Rules and Other Clarifications

Nasdaq proposes to amend Rule 5615(c)(3) to clarify that the applicable phase-in periods for companies ceasing to be a Controlled Company will be computed beginning on the date the company ceases to be a Controlled Company.

In light of the proposed clarifications and modifications described above and to promote a coherent structure of the Listing Rules, Nasdaq proposes to

renumber Rules 5615(c)(1), 5615(c)(2), and 5615(c)(3) as 5615(a)(7)(A), 5615(a)(7)(B), and 5615(b)(7). Nasdaq also proposes to amend the title of the proposed Rule 5615(b)(7) to improve the readability of the rule without changing its substance and update cross references to account for renumbering of the rules.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,²⁴ in general and with Sections 6(b)(5) of the Act,²⁵ in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Exchange further believes that the proposal is consistent with Rule 10A-3 under the Act concerning audit committee requirements for listed companies.

In approving substantially similar amendments by the NYSE, except for the clarification of the unavailability of a grace period following the expiration of a phase-in period, as described above, the Commission indicated that it believes that:

the proposed amendments relating to the phase-in period for specified companies newly listing on the [NYSE] (or newly becoming subject to certain corporate governance listing standards as a result of change in status) are reasonable. The proposed rules would permit a phase-in schedule similar to that allowed under the current rules for a company listing in conjunction with an IPO, and would extend such a phase-in schedule appropriately to companies listing in conjunction with spin-off and carve-out transactions, while offering an acceptable minimal tolerance for the special circumstances of each of these types of new listings with respect to the point in time that the standards would begin to apply. The Commission notes that the [NYSE's] proposal does not make adjustments for compliance with any requirements of Rule 10A-3 under the Act.

The proposed rule change also would allow a company listing in conjunction with an IPO, a spin-off, or a carve-out a phase-in period with respect to the NYSE requirement that the audit committee of a listed company have at least three members. In the

²³ See Section 303A.00 Introduction; of the NYSE Listed Company Manual. See also Securities Exchange Act Release No. 61067 (November 25, 2009), 74 FR 63808 (December 4, 2009) (approving SR-NYSE-2009-89).

²⁴ 15 U.S.C. 78f.

²⁵ 15 U.S.C. 78f(b)(5).

Commission's view, permitting a company to have only one member on its audit committee by the listing date, at least two members within ninety days of the listing date, and three members within a year of the listing date, affords a reasonable accommodation for such companies.²⁶

The proposed rule change is also consistent with the provisions of Section 6 of the Act,²⁷ in general and with Sections 6(b)(5) of the Act, in that it will clarify Nasdaq's current position as to the applicability of the phase-in periods for independent board and committee requirements for companies listing in connection with the IPO and codify treatment of a carve-out or spin-off transaction in this regard. The amended rules will also provide for treatment of companies that ceased to qualify as a foreign private issuer, the eventuality on which the rules are currently silent. This greater clarity and uniformity of treatment will promote just and equitable principles of trade. The proposed changes will enhance investor protection by making the impacted rules more transparent and easier to understand. In addition, Nasdaq will continue to protect investors and the public interest by maintaining the current requirements for the audit, nominations, and compensation committees, as well as the requirement for a majority independent board.

The proposed rule change is also designed to provide companies that are newly listing on Nasdaq and becoming subject to certain corporate governance listing standards as a result of this change in status a reasonable transition period, similar to that allowed under the current rules for a company listing in conjunction with an IPO and to that allowed by the NYSE. In this regard, the proposed rule change is designed to remove impediments to and perfect the mechanism of a free and open market and a national market system.

The proposed rule change makes no adjustments for compliance with any requirements of SEC Rules 10A-3 or 10C-1 under the Act, nor does the proposed rule change grant an exemption or phase-in period with respect to the requirement in Rule 5605(c)(2)(A) that every listed company's audit committee—without distinction as to the committee's size—have at least one member who has past employment experience in finance or accounting, requisite professional certification in accounting, or any other comparable experience or background which results in the individual's

financial sophistication. The revised rules will also require that, for a company with securities registered pursuant to Section 12(g) of the Act that lists those securities on Nasdaq, only independent directors, as defined in Rule 5605(a)(2), be permitted on the audit committee during the transition period. In addition, SEC Rule 10A-3 under the Act requires at least one member of a listed company's audit committee to be independent as of the Listing Date, even when the company is allowed a phase-in period with respect to the other audit committee members.²⁸ As a result, Nasdaq believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices and to protect investors and the public interest.

To improve the readability of the rules Nasdaq proposes to renumber certain rules and make other clarifying and conforming changes without changing the substance of such rules. Nasdaq believes that the improved readability of the rules will perfect the mechanism of a free and open market by making the rules easier to understand and apply.

Finally, Nasdaq proposes to amend Listing Rules 5605(b)(1), 5605(c)(4), 5605(d)(4), and 5810(c)(3)(E) to codify its current position that a company relying on any phase-in period in Rule 5615(b) is not eligible for a cure period provided by Rule 5810(c)(3)(E), immediately following the expiration of the phase-in period, unless the Company demonstrated compliance with the applicable requirement during such phase-in period. In a situation where a company lists on Nasdaq, relies on the phase-in period for one of the independent committees or the independent board requirements, and allows the phase-in period to run out without gaining compliance with the rule, Nasdaq believes it is not appropriate for the Company to rely on the grace period immediately thereafter thus effectively extending the phase-in period. Nasdaq believes that this rule change will protect investors and the public interest by limiting the maximum time a company may remain listed without fully complying with independent committees or the independent board requirements.

Finally, Nasdaq believes that codifying Nasdaq's position regarding the computation of the applicable phase-in periods, as well as other clarifying changes will perfect the

mechanism of a free and open market by making the rules easier to understand and apply.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. The proposed rule change will have little or no impact on competition as it merely eliminates potential confusion, clarifies Nasdaq current position as to the applicability of its rules, and harmonizes Nasdaq's rules regarding the applicability of the phase-in periods for audit, nominations, and compensation committees, as well as the requirement for a majority independent board with the requirements of the NYSE.²⁹ Similarly, Nasdaq believes that the proposed amendments will have little or no impact on the intra market competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) by order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or

²⁹ See Section 303A.00 Introduction; of the NYSE Listed Company Manual. See also Securities Exchange Act Release No. 61067 (November 25, 2009), 74 FR 63808 (December 4, 2009) (approving SR-NYSE-2009-89).

²⁸ See 17 CFR 240.10A-3(b)(1)(iv) (providing an exemption for an issuer that was not required to file reports with the Commission pursuant to section 13(a) or 15(d) of the Act).

²⁶ See the NYSE Approval Order at 63,810.

²⁷ 15 U.S.C. 78f.

- Send an email to rule-comments@sec.gov. Please include file number SR–NASDAQ–2024–019 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–NASDAQ–2024–019. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–NASDAQ–2024–019 and should be submitted on or before June 20, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³⁰

Sherry R. Haywood,
Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–100213; File No. SR–NYSEARCA–2024–31]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Amendment No. 1 to a Proposed Rule Change To List and Trade Shares of the Bitwise Ethereum ETF

May 22, 2024.

On March 28, 2024, NYSE Arca, Inc. (“NYSE Arca” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b–4 thereunder,² a proposed rule change to list and trade shares of the Bitwise Ethereum ETF under NYSE Arca Rule 8.201–E (Commodity-Based Trust Shares). The proposed rule change was published for comment in the **Federal Register** on April 8, 2024.³ On May 21, 2024, the Exchange filed Amendment No. 1 to the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. Amendment No. 1 replaced and superseded the proposed rule change in its entirety. The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 1, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to list and trade shares of the Bitwise Ethereum ETF (the “Trust”) under NYSE Arca Rule 8.201–E (Commodity-Based Trust Shares). This Amendment No. 1 to SR–NYSEARCA–2024–31 replaces SR–NYSEARCA–2024–31 as originally filed and supersedes such filing in its entirety. The proposed rule change is available on the Exchange's website at www.nyse.com, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change

and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to list and trade shares (“Shares”) of the Trust⁴ pursuant to NYSE Arca Rule 8.201–E, which governs the listing and trading of Commodity Based Trust Shares.⁵

According to the Registration Statement, the Trust will not be registered as an investment company under the Investment Company Act of 1940,⁶ and is not required to register thereunder. The Trust is not a commodity pool for purposes of the Commodity Exchange Act.⁷

The Exchange represents that the Shares satisfy the requirements of NYSE Arca Rule 8.201–E and thereby qualify for listing on the Exchange.⁸

Operation of the Trust⁹

The Trust will issue the Shares which, according to the Registration Statement, represent units of undivided beneficial ownership of the Trust. The Trust is a Delaware statutory trust and will operate pursuant to a trust agreement (the “Trust Agreement”) between Bitwise Investment Advisers, LLC (the “Sponsor” or “Bitwise”) and Delaware Trust Company, as the Trust's trustee (the “Trustee”). Coinbase Custody Trust Company, LLC will maintain custody of the Trust's ether (the “Ether Custodian”). Bank of New York Mellon will be the custodian for

⁴ The Trust is a Delaware statutory trust. On March 28, 2024, the Trust filed with the Commission an initial registration statement (the “Registration Statement”) on Form S–1 under the Securities Act of 1933 (15 U.S.C. 77a). The description of the operation of the Trust herein is based, in part, on the most recent Registration Statement. The Registration Statement is not yet effective, and the Shares will not trade on the Exchange until such time that the Registration Statement is effective.

⁵ Commodity-Based Trust Shares are securities issued by a trust that represents investors' discrete identifiable and undivided beneficial ownership interest in the commodities deposited into the trust.

⁶ 15 U.S.C. 80a–1.

⁷ 17 U.S.C. 1.

⁸ With respect to the application of Rule 10A–3 (17 CFR 240.10A–3) under the Act, the Trust relies on the exemption contained in Rule 10A–3(c)(7).

⁹ The description of the operation of the Trust, the Shares, and the ether market contained herein is based, in part, on the Registration Statement. See note 4, *supra*.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

³ See Securities Exchange Act Release No. 99889 (Apr. 2, 2024), 89 FR 24509. Comments on the proposed rule change are available at: <https://www.sec.gov/comments/sr-nysearca-2024-31/srnysearca202431.htm>.

³⁰ 17 CFR 200.30–3(a)(12).